Filed 1/25/19 Morales v. Thee Aguila, Inc. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID M. MORALES et al.,

Plaintiffs, Cross-Defendants and Respondents,

v.

THEE AGUILA, INC.,

Defendant, Cross-Complainant and Appellant.

G055224

(Super. Ct. No. 30-2011-00504723)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Law Office of Guinevere M. Malley and Guinevere M. Malley for Defendant, Cross-Complainant and Appellant.

Zeiler Law Group and Kerry P. Zeiler for Plaintiffs, Cross-Defendants and Respondents.

* * *

Thee Aguila Inc. (TAI) appeals from the trial court's postjudgment order granting respondents David M. Morales (the son) and his father, David Morales, Sr., their request for contractual attorney fees totaling $331,385. The fee award is based on the attorney fee provision in a two-page handwritten contract (Contract II) between TAI and the respondents. Because the factual background and applicable legal principles are straightforward, we turn to them immediately to resolve the appeal with appropriate brevity.

TAI's sole challenge to the fee award rests on an attorney fee provision in a different contract (Contract I) as to which neither TAI nor Morales, Sr. was a party. That contract was a purchase agreement for the sale in the son's chapter 11 bankruptcy proceeding of his real property interest in a location used as a food truck commissary in Santa Ana (the city). The seller and buyer in that real property contract were, respectively, the son's bankruptcy estate and an individual by the name of Henry Aguila. Aguila, an attorney, was (and apparently still is) a principal officer or owner of TAI, but TAI was not the real property purchaser in Contract I. Instead, Aguila later vested ownership of the property in TAI.

In Contract II, the father and son respondents in this case guaranteed *to TAI* that the food truck commissary TAI planned to operate at the property would pass all necessary inspections and obtain its business license from the city. TAI does not dispute that respondents subsequently prevailed in this action on their claims under Contract II against TAI and successfully defended against TAI's counterclaims under Contract II, or that the real property purchase agreement in Contract I was not litigated in the proceedings leading to this appeal. TAI simply observes, as it did below, that the attorney fee provision in Contract I included terms requiring mediation and—to enforce that requirement—precluded attorney fees for the prevailing party on claims litigated under Contract I if the prevailing party failed to seek mediation before filing suit. TAI contends that this mediation provision in Contract I was incorporated into Contract II.

TAI does not dispute that Contract II does not expressly include a mediation requirement, nor that the express attorney fee provision in Contract II does not mention mediation.

Nevertheless, in support of its position that mediation was implicitly required before respondents could file suit against TAI for claims under Contract II, TAI relies on paragraph 3 of its handwritten contract with respondents in Contract II. Paragraph 3 states: "This Agreement incorporates all prior oral and/or written agreements *between the parties hereto*." (Italics added.)

Respondents point out that the parties to Contract I and Contract II are different. They therefore argue that, by its terms, Contract II does not incorporate any part of Contract I. Respondents also view the paragraph 3 language as an integration clause that bars parol evidence to vary the terms of the parties' written agreement because the parties intended its handwritten terms to encapsulate their entire agreement. Even in the face of an integration clause, however, parol evidence may be *considered* by the trial court to determine its admissibility.

"'The decision whether to admit parol [or extrinsic] evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step-interpreting the contract. [Citation.]'" (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1133.) Conceivably, therefore, TAI could have requested that the trial court admit evidence of its negotiations with respondents on Contract II to show that TAI, or both TAI and respondents, understood and intended the terms of Contract I—including the mediation requirement—to be included in Contract II. In other words, TAI could have sought to introduce evidence that the incorporation language in paragraph 3 regarding prior agreements was ambiguous because the parties in Contract II intended to

incorporate Contract I's terms even though the "parties hereto" in each agreement were not identical.

None of this aids TAI on appeal, however. Nothing suggests TAI sought to introduce parol evidence. Indeed, TAI does not include the reporter's transcript of the proceedings below. By foregoing a reporter's transcript, TAI effectively elected to proceed solely based on the clerk's transcript (Cal. Rules of Court, rules 8.121, 8.122), which we treat as an appeal on the "judgment roll." (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082.) On a judgment roll appeal, our review is limited to determining whether any error appears on the face of the record. (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521.) We discern none.

In the absence of extrinsic evidence showing a shared understanding of ambiguous terms, the objective rule of contracts applies. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955-956.) Specifically, "'[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation.'" (*Id.* at p. 956.) Where no parol or extrinsic evidence is introduced, as here, we review contract terms de novo. (*Id.* at p. 955.)

By its express terms, Contract II incorporated only prior oral or written agreements between the "parties hereto," i.e., the parties to Contract II: TAI and respondents. Nothing on the face of the judgment roll or clerk's transcript suggests the parties to Contract II intended to include in that agreement the terms of another contract between other parties (Contract I). The "parties hereto" in each contract were different and therefore, without parol evidence, nothing suggests the three parties to Contract II incorporated Contract I's terms, including its mediation-as-a-prerequisite-to-attorney-fees provision.

TAI's reliance on Civil Code section 1642 is misplaced because that section expressly applies to contracts "between the same parties." Specifically, it provides: "Several contracts relating to the same matters, *between the same parties*, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642, italics added.) The parties on appeal debate whether Contracts I and II related to the same matters and were part of "substantially one transaction" (*ibid.*), but the lack of "same parties" is fatal to TAI's claim that Contract II incorporated a different contract's mediation requirement. Consequently, TAI's challenge to the attorney fee award fails.

DISPOSITION

The trial court's attorney fee award is affirmed. Respondents are entitled to their costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.